IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
SIXTH DIVISION

FILED
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CAROLYN STALEY
CIRCUIT COUNTY CLERK

GARY KENT JONES
JEAN L. JONES — PLAINTIFF

V. — CASE NO. CIV 03-8566

LINDA K. FLOWERS and
MARK WILCOX, COMMISSIONER OF
STATE LANDS, STATE OF ARKANSAS — DEFENDANTS

AFFIDAVIT

STATE OF ARKANSAS]
]
COUNTY OF PULASKI]

I, Patricia Lah, after being duly sworn, state on oath as follows:

I have been employed with the Commissioner of State Lands office since April 1999. My official title is Assistant to the Legal Counsel. I am familiar with the laws and procedures governing the sale of tax delinquent land and I have reviewed the documents related to the sale of the property which is the subject of this lawsuit. The records indicate the following:

1. Pulaski County parcel number 43L-215.00-188.00 (Lot 10 and S 20' of Lot 11, Success Addition to the City of Little Rock) was certified to the Commissioner of State Lands from Pulaski County for the nonpayment of real property taxes for the year 1997 on February 24, 2000. (Commissioner of State Lands Exhibit 1).

2. The parcel was certified in the name of Gary Kent Jones, 717 N. Bryan Street, Little Rock, AR 72205.

3. Following certification from the county, the Commissioner of State Lands sent by certified mail a letter, petition to redeem, and instructions, notifying Mr. Jones of the certification, his rights to redeem, and setting a public sale date of 4/17/2002. (Commissioner of State Lands Exhibit 2). The right to redeem property 30 days subsequent to public auction is clearly outlined in the instructions.

4. The entire notification packet was returned to the Commissioner of State Lands by certified mail return receipt requested and marked unclaimed. The return envelope indicates that the post office attempted delivery of the packet of 4-13, 3-19, and 4-29 of 2000. (Commissioner of State Lands Exhibit 3).

5. ~~Subsequent~~ Prior to the public sale date, the Commissioner of State Lands purchased a title report from Walker Title Abstract Company concerning the parcel (Commissioner of State Lands Exhibit 4). The title report listed Gary Kent Jones as owner at the date of forfeiture and that DF&A held unreleased liens on the parcel.

6. Notice of the sale by certified mail was sent to DF&A by letter, dated February 27, 2002. (Commissioner of

State Lands Exhibit 5). A green card indicating delivery to DF&A was returned to the Commissioner of State Lands. (Commissioner of State Lands Exhibit 6).

7. On April 1, 2002, a notice of the public sale was published in the Arkansas Democrat Gazette. (Commissioner of State Lands Exhibit 7). The notice contained sale date information and redemption information. The parcel appears as item 806 listed as Jones, Gary Kent, along with the legal description, lien information, minimum bid, and tax due amounts.

8. The parcel did not receive a bid at the public sale and did not sell.

9. By law, parcels not sold at public sale are subject to negotiated sale. On February 5, 2003, Linda K. Flowers submitted an Offer to Purchase the parcel to the Commissioner of State Lands. (Commissioner of State Lands Exhibit 8). Ms. Flowers offered to pay a total of $21,042.15, which included the taxes for the years 1997 through 2001, as well as the assessed value of $14,604.00.

10. Subsequent to receipt of the offer, the Commissioner of State Lands office performed negotiated sale research. (Commissioner of State Lands Exhibit 9).

11. On February 19, 2003, a notice of the pending negotiated sale was sent by certified mail to Gary Kent Jones at 717 N. Bryan Street, Little Rock, AR 72205. (Commissioner of State Lands Exhibit 10). The letter was returned, marked Unclaimed. (Commissioner of State Lands Exhibit 11).

12. On February 19, 2003, a notice of the pending negotiated sale was sent by certified mail to DF&A. (Commissioner of State Lands Exhibit 12). The letter was received. (Commissioner of State Lands Exhibit 13).

13. The taxes remained delinquent and unpaid.

14. Limited Warranty Deed Number 140635 was issued on May 28, 2003, to Linda K. Flowers. (Commissioner of State Lands Exhibit 14).

/s/ Patricia Lah
Patricia Lah

Subscribed and sworn to on November 25, 2003.

/s/ Lisa A. Pelton
Notary Public

My Commission Expires August 17, 2010

[Notary Seal Omitted In Printing]

State of Arkansas
Commissioner of State Lands

Mark Wilcox
Commissioner

Returned
Unclaimed

February 19, 2003

GARY JONES
717 N. BRYAN ST.
LITTLE ROCK, AR 72205

RE: Parcel # 43L-215.00-188.00, Code: 215-3 1997, Pulaski County, Arkansas
Description: LOT 10 & S20' OF LOT 11; LIEN-DF&A SUCCESS 22

Dear GARY JONES :

The parcel of property referenced above has been certified to the Commissioner of State Lands office for delinquent taxes pursuant to Act 626 of 1983, as amended. The tax records show that GARY KENT JONES is the owner of the above referenced parcel. Unless all taxes, penalties, interest and costs are paid to this office, a deed conveying title to a new owner will be issued on 3/21/2003.

If you have an interest in the property, in order to avoid its sale and additional costs, you should contact the Records Department of this office immediately for a petition to redeem, which will provide you with the total amount due. Please reference the code

number, parcel number or provide a copy of this letter when requesting a petition to redeem.

If you have sold this property, please refer this information to the new owner. If you have no interest in the property, please disregard this notice. We diligently attempt to notify all those persons who may have an interest, including those people with the same name as the owner of record, in hopes of reaching the correct owner of the property.

If you have any questions regarding this matter, please contact this office at 501-324-9222.

Sincerely,

/s/ Mark Wilcox

Mark Wilcox
Commissioner of State Lands

Commissioner of State Lands
CERTIFIED COPY

MW/BH:

EXHIBIT 10

State Capitol Building • Little Rock, Arkansas 72201
501-324-9222 • *FAX* 501-324-9421

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Supreme Court, U.S.
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(4)

No. 04-1477

IN THE

Supreme Court of the United States

GARY KENT JONES,

Petitioner,

v.

LINDA K. FLOWERS and MARK WILCOX,
Commissioner of State Lands,

Respondents.

On Writ of Certiorari to the
Supreme Court of Arkansas

BRIEF FOR PETITIONER

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November 2005 *Counsel for Petitioner*

QUESTION PRESENTED

When mailed notice of a tax sale or property forfeiture is returned undelivered, does due process require the government to take additional reasonable steps to locate the owner before taking the property?

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Arkansas Supreme Court will be published in the S.W.3d reporter. The opinion is available at 2004 WL 2609800 and is reproduced in the appendix to the petition for a writ of certiorari (Pet. App.) at 1a. The Arkansas Supreme Court's unreported order denying rehearing is reproduced at Pet. App. 14a. The trial court's unreported order granting respondents' motions for summary judgment and denying petitioner's motion for summary judgment is reproduced at Pet. App. 12a.

JURISDICTION

The Arkansas Supreme Court entered its judgment on November 18, 2004 and denied a timely petition for rehearing on January 6, 2005. On March 23, 2005, Justice Thomas extended the time to file the petition for a writ of certiorari to May 6, 2005. The petition was filed on May 5, 2005 and granted on September 27, 2005. This Court has jurisdiction under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in relevant part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law[.]"

STATEMENT OF THE CASE

Petitioner Gary Kent Jones lost his house in a tax sale because he did not receive notice until it was too late to redeem the property. The State had sent two notices by certified mail to Mr. Jones at an address where he did not reside. Both letters were returned unclaimed. Although the State knew that its attempts to provide notice by certified mail had failed, and

although Mr. Jones's correct mailing address was readily available from a variety of sources, the State made no other effort to contact Mr. Jones before taking his property.

Once Mr. Jones learned that his house had been sold to respondent Linda K. Flowers, he brought this action against Ms. Flowers and the State, seeking to have the sale set aside because the State had failed to take reasonable steps to notify him of the tax sale and his right to redeem. The trial court granted summary judgment for the purchaser and the State, holding that the State had complied with the applicable statute and constitutional due process. The Arkansas Supreme Court affirmed, holding that even after the State learned that it had failed to notify Mr. Jones by mail, due process did not require that the State do anything more to try to provide effective notice before taking the property. As explained below, that holding cannot be reconciled with this Court's due process rulings and, therefore, should be reversed.

A. Factual Background

In 1967, Mr. Jones purchased a house located at 717 North Bryan Street in Little Rock, Arkansas, where he lived with his wife until they separated in 1993. Pet. App. 2a. Mr. Jones moved out of the house and into an apartment in Little Rock. Mrs. Jones continued to live in the house. *Id.* After the mortgage was paid off in 1997, the property taxes went unpaid. *Id.* Mr. Jones did not notify the property tax collector of his new mailing address, *id.*, but it was readily ascertainable from multiple sources, including the Little Rock phone book, the Pulaski County roll of registered voters, and the State income tax rolls. Joint Appendix (JA) 10.

The State certified Mr. Jones's property as delinquent for non-payment of taxes for 1997 and later years. Pet. App. 2a. In April 2000, the State mailed a certified letter to Mr. Jones at

the Bryan Street address in an attempt to notify him of the delinquency and his right to redeem the property by paying his back taxes. *Id.* The notice stated that, unless redeemed, the property would be subject to a public sale two years later, on April 17, 2002. *Id.* Because the notice was addressed to Mr. Jones alone and sent only to the Bryan Street address and not to his apartment, Mr. Jones did not receive it. The post office returned the notice to the State marked "unclaimed." *Id.*

Prior to the public sale date, the State purchased a title report to identify those with an interest in the property. The title report confirmed that Mr. Jones was the owner. JA 12. On April 1, 2002, a notice of the public sale was published in a newspaper. Pet. App. 2a.

No bids were made for Mr. Jones's house at the public sale. However, on February 5, 2003, respondent Flowers submitted a purchase offer to the State. *Id.* As part of its standard process for negotiated sales, the State visited the Bryan Street property and viewed the house, but it did not contact the occupants or post a notice of the pending sale. JA 13; Record (R) 110.

On February 19, 2003, the State sent a certified letter addressed solely to Mr. Jones at the Bryan Street address to attempt to notify him that his house would be sold if the taxes and penalties were not paid. Pet. App. 2a. Like the first letter sent by the State to Mr. Jones at the Bryan Street address, the second letter was returned to the State unclaimed. *Id.* Although the State knew that Mr. Jones had not received the two notices it sent by certified mail to the Bryan Street address, the State made no effort to determine Mr. Jones's correct mailing address, even though his current address could have been discovered with minimal effort.

On May 28, 2003, Ms. Flowers purchased the home for $21,042.15 through a negotiated sale.[1] Pet. App. 2a. Even then, Mr. Jones had a 30-day period in which he could have redeemed his property had he known that it had been sold. Ark. Code Ann. § 26-37-202(e). On July 2, 2003, shortly after the 30-day post-sale redemption period had passed, Ms. Flowers had an unlawful detainer notice delivered to the property. The notice was served on Cindy Edrington (the daughter of Mr. and Mrs. Jones) who contacted Mr. Jones, providing him his first actual notice of the tax sale. Pet. App. 2a-3a; JA 5; R 11.

B. Proceedings Below

Mr. Jones filed suit on July 28, 2003, alleging that the sale of his property was invalid because he did not receive constitutionally adequate notice of the tax sale or his right to redeem. Pet. App. 2a. Mr. Jones alleged that the State's failure to take reasonable steps to provide actual notice resulted in the taking of his property without due process. *Id.* at 3a. Ms. Flowers filed a counterclaim for unlawful detainer, and she moved for summary judgment, arguing that the two unclaimed letters sent by the State provided constitutionally sufficient notice to Mr. Jones.[2] *Id.* The State filed a similar motion for summary judgment, and Mr. Jones filed a cross motion for summary judgment. *Id.*

On January 14, 2004, the trial court granted summary judgment for Ms. Flowers and the State, denied Mr. Jones's

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[1]The parties have stipulated that the fair market value of the property was about $80,000. R 224.

[2]After Ms. Flowers filed her counterclaim, Mr. Jones's estranged wife joined the suit as a plaintiff because she was living in the house. Pet. App. 3a.

motion for summary judgment, and granted Ms. Flowers's counterclaim for unlawful detainer. *Id.* The trial court found that the applicable tax sale statute, Ark. Code Ann. § 26-37-301, complied with constitutional requirements of due process and that Ms. Flowers was entitled to immediate possession of the property.[3] Pet App. 3a.

Mr. Jones appealed the trial court's order, and the case was certified to the Arkansas Supreme Court from the Arkansas Court of Appeals. Pet. App. 1a. The Arkansas Supreme Court affirmed the trial court's decision. It found that the State had complied with the statutory scheme for tax sales, Ark. Code Ann. § 26-37-301, and held that "the constitutional dictates of due process" do not require "that the State must try to locate the correct address of a delinquent taxpayer when a notice is returned unclaimed." Pet. App. at 6a. The court recognized that this Court has held that due process requires "'notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *Id.* at 7a (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)). Nevertheless, the court rejected Mr. Jones's argument that "it is unreasonable for the State not to attempt to locate a property owner's correct address" when the State knows that the original effort at notice has failed. *Id.* at 11a.

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[3]The statute at issue, Ark. Code Ann. § 26-37-301, was amended effective January 1, 2004, to require personal service of process on the owner of a homestead, if the State fails to receive proof that the notice sent by certified mail was received by the owner. *See* 2003 Ark. Laws Act 1376. As the court below recognized, the amendment has no effect on this case. Pet. App. 9a-10a.

SUMMARY OF THE ARGUMENT

The decision below should be reversed because Mr. Jones was deprived of his property without due process of law. Due process requires notice "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action" so that such parties may protect their interests. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). In this case, the State *knew* that its initial effort to provide notice by certified mail had failed. Under the circumstances, a reasonable person actually desiring to provide notice would have searched available records for Mr. Jones's correct mailing address and would have contacted the occupants of the property. Such efforts would have resulted in effective notice to Mr. Jones without undue burden on the State because Mr. Jones's address was readily and inexpensively ascertainable from a variety of sources, including records maintained by the State. Because the State made no effort to attempt to provide actual notice to Mr. Jones following return of its mailed notices, the State violated the Fourteenth Amendment by failing to take reasonable steps to notify Mr. Jones of the imminent loss of his property.

ARGUMENT

WHERE THE GOVERNMENT KNOWS THAT ITS ATTEMPT TO PROVIDE NOTICE HAS FAILED, DUE PROCESS REQUIRES THAT IT TAKE FURTHER REASONABLE STEPS TO NOTIFY THE OWNER BEFORE TAKING THE PROPERTY.

In *Mullane*, this Court held that "[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the